Supreme Court

OF THE UNITED STATES

Supreme Court, U. S.
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SUPREME COURT, U. S.

HUDSON VALLEY ASBESTOS CORPORATION,

Petitioner,

against

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., and HARRY E. TOMPKINS, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

HUDSON VALLEY ASBESTOS CORPORATION,

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against

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., AND HARRY E. TOMPKINS, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 21, 1975.

CITATIONS TO THE OPINIONS BELOW

The opinion of Judge Lloyd F. MacMahon dismissing plaintiff's second amended complaint on the merits appears in Appendix B infra, and is unreported. The opinion of the Circuit Court of Appeals is to date unreported and appears in Appendix A infra.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is it a per se violation of Sherman Act Sec. 1 for the principals of two corporations which compete as buyers in a market to create a seller in that market for the purpose of depressing prices bid to those corporations from that market?

2. Is a corporation injured within the meaning of the anti-trust laws if it terminates its businesses as a result of such combination?

3. Is it an indirect "acquisition" in violation of Clayton Act Section 7 for the respective Presidents and principal shareholders in two corporations which are in direct competition with each other, to acquire by joint venture a corporation which substantially lessens competition in a line of commerce?

Statutes involved

The statutes involved on this appeal are 15 USC Section 1; 15 USC Section 15; and 15 USC Section 18. These provisions are reproduced in Appendix C hereto.

STATEMENT

The plaintiff-petitioner hereinafter, Hudson Valley, was incorporated in 1922. Thereafter, until August 19,1961

Hudson Valley competed for insulation subcontracts primarily in Albany, Rensselaer and Schenectady counties. The insulation sub-contracting business in the Counties of Albany, Rensselaer and Schenectady functioned as follows:

Prior to submitting their own bids on projects, prime heating and plumbing contractors would invite bids for specific jobs from insulation subcontractors. These bids were used by the prime contractors in computing their own bids. After the award of a contract, the successful prime contractor would award the insulation subcontract to the insulation subcontractor of his choice. The low bidding insulation subcontractor frequently was not awarded a subcontract but certain of the insulation subcontractors were favored by certain prime contractors which would afford a favored subcontractor an opportunity to meet the low bid. (A-2, A-3, B-1-B-2, B-5-B-7)

The Defendants Tougher Company and Tompkins Company are prime heating and plumbing contractors having their main offices in Albany County. Robert Tougher is president and controlling shareholder of Tougher Company and Harry E. Tompkins, Sr. is the president and controlling shareholder of Tompkins Company. (A-9)

Tougher Company and Tompkins Company are competing prime heating and plumbing contractors. (B-9)

In the years 1957 through 1961 Tougher Co. and Tompkins Co. together accounted for over 40% of the dollar value of Hudson Valley insulation contracts. (A-3)

In the year Tri-City was formed, Tougher Co. and Tompkins Co. together controlled 44% of the insulation contracts let in the Counties of Albany, Schenectady and Rensselaer. For the next four years the average was over 23% (B-10). This represented control of over $1,000,000 worth of insulation contracts.

"In May 1961 Robert Tougher and Harry E. Tompkins, Sr. first discussed the possibility of forming their own insulation subcontracting company. They were dissatisfied with the subcontractors with whom they had been dealing and wanted to obtain fair and reasonable prices for insulation work." (A-3)

"Tri-City was formed out of apparent dissatisfaction with the high level of the bids Tougher and Tompkins were receiving from insulation contractors..."(A-5).

The Court of Appeals found that Tougher and Tompkins, who had founded Tri-City for the purpose of depressing prices bid to their companies, instructed Tri-City's manager as to bidding. (A-5, Appendix D)

The District Court found that subsequent to its formation Tri-City received all of the insulation subcontracts to the exclusion of other subcontractors of Tougher Company and Tompkins Company in the three county area of Albany, Schenectady and Rensselaer. (B-10)

After Tri-City commenced operations, Hudson Valley terminated its insulation contracting business, because it could not

operate profitably without the Tougher and Tompkins Co.'s business.

Reasons for Granting the Writ

I

The Court of Appeals in the instant case has sanctioned a combination of buyers formed for the purpose of depressing prices, and has thus overruled U.S. v. Socony Vacuum Oil Co., 310 U.S. 150. Both the District Court and the Court of Appeals found that the defendants' purpose was to affect the market price. (A-3, A-5) Defendants combination to compel "fair and reasonable prices" is a per se violation of the anti-trust laws. As this Court stated in U.S. v. Socony Vacuum Oil Co., 310 U.S. 150, 22, 223, prices are fixed:

> "if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or are on ascending or descending scales, if they are to be uniform, or if by various formulae, they are related to the market prices. They are fixed because they are agreed upon. And the fact that as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price fixing.***"

(and)

> "***under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in inter-state or foreign commerce is illegal.
> (Emphasis supplied)

Thus, both lower courts recognized that Tougher and Tompkins were dissatisfied with the prices bid to their respective companies and that they joined together, despite the fact that their companies were competitors and formed Tri-City for the stated purpose of depressing prices bid to Tougher Co. and Tompkins Co. It is a per se violation for buyers as well as sellers to fix a price. Mandeville Island Farms v. American Crystal Sugar Co. 334 U.S. 219. A fortiori it is a per se violation for buyers to refuse to trade for the purpose of coercing sellers to deal at a price fixed by buyers. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, which holds that a refusal to trade for the purpose of price-fixing violates the antitrust laws. It is clear that Tougher Co. and Tompkins Co. would not deal with insulation sub-contractors other than Tri-City unless they met the depressed prices dictated by the combination. Tri-City was formed for the stated purpose of affecting the price structure in the insulation submarket. Such activity by competitors is illegal. It is critical that this court review this significant departure from established Sherman Act principles.

II

The Second Circuit in the instant case has abandoned the standing test announced in Billy Baxter Inc. v. Coca Cola Co. 431 F. 2d 183 (2d. Cir. 1970) cert. denied 401 U.S. 923, and has thereby come in direct conflict with both the Ninth Circuit's Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358 and the Fifth Circuit's Gulf Oil

Corp. v. Wood, 498 F 2d 1240 (1974) Petition for Certiorari denied, 3/24/75 _____U.S._____

As stated in Billy Baxter Inc. v. Coca Cola Co., 431 F. 2d 183, 187

> "There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage. (Emphasis supplied)

The Court of Appeals found that in the years 1957 through 1961 Tougher Co. and Tompkins Co. together accounted for over 40% of the dollar value of Hudson Valley's insulation contracts.

The District Court expressly found:

> "Kuhl and Pursel believed that Tougher Co. would award all its insulation contracts to Tri-City and that without those contracts Hudson Valley could not sustain its insulation contracting business." (B-4) (Emphasis supplied)

The Court found that Tri-City was put into operation for the purpose of depressing prices bid to Tougher Co. and Tompkins Co.

Thus, Hudson Valley's market was invaded by its two principal customers for the stated purpose of driving Hudson Valley's prices down. Hudson Valley was injured by this coercive behavior.

Obviously, a combination of buyers entering a market for the purpose of depressing prices, injures a seller who has a substantial amount of business with those buyers.

The entry of Tri-City into the market for this purpose necessarily had a direct and immediate effect upon Hudson Valley's fair market value. See Albrecht v. Herald Co. 452 F. 2d 124 8th. Cir. (1971) The District Court further found that:

> "The evidence did establish that Tougher Co. and Tompkins Co. awarded all their insulation contracts in the three-county Albany area to Tri-City..."
> (B-10)

These findings unquestionably establish that the combination was a "material cause" and "substantial factor" of the injury to Hudson Valley. It was the reason Hudson Valley terminated its insulation business. In light of these facts the conclusion by the Second Circuit that Hudson Valley voluntarily terminated its business is clear legal error and constitutes a holding that Hudson Valley was legally required to continue in business until " directly shut down by the violator", in conflict with the Fifth Circuit's holding in Gulf Oil Co. v. Wood, supra.

The right to engage in a business is a well recognized legal interest which the law protects.

A person has a legal right to

> engage in a lawful business. If he is unlawfully excluded from exercising his right, when he is prepared and intends to exercise it he suffers injury for which the law awards damages - he is "injured" within the meaning of the federal statute.

Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 F. 2d 254, 260 (2d Cir. 1908).

Thus, a plaintiff who is in the target area of a conspiracy in violation of the antitrust law need not remain in business to maximize his damages. All that must be shown is that plaintiff's legal interest in operating a business has been infringed. This proposition has been recognized by the Court of Appeals for the Fifth Circuit, which stated:

> The anti-trust law does not require a plaintiff to retain possession of a business oppressed by anti-trust violation until the business is bankrupted or directly shut down by the violator. Gulf Oil Co. v. Wood, supra.

Plaintiff has a cause of action under 15 USC §15 if it was within the "target area" of the defendants illegal practices and if the injury to his business was caused by those illegal practices. Billy Baxter, Inc. v. Coca Cola Co., 431 F. 2d 183 (2d Cir. 1970) Cert. denied 401 US 923; Herman Schwabe Inc. v. United Shoe Machinery Corp. 297 F. 2d 906 (2nd. Cir. 1962) Cert. denied 369 U.S. 865; Karseal Corp.

v. Richfield Oil Corp., 221 F. 2d 358 (9th. Cir. 1955).

Hudson Valley was within the "target area" of defendants conspiracy. The Court of Appeals determined that Tougher and Tompkins formed Tri-City because they were dissatisfied with the Albany based insulation subcontractors (A-5). Hudson Valley was an Albany based contractor and was clearly aimed at.

Hudson Valley was hit.

The conspiracy directly affected the market share controlled by Tougher and Tompkins, who "together accounted for over 40% of the dollar volume of Hudson Valley's insulation contracts. (A-3)

Further, as the Court of Appeals recognized, the market was not an open one. The practice was to permit a favored insulation subcontractor to meet the lowest bid. (A-2, A-3)

A reduction in plaintiff's business by 40% would not merely cut profits by that amount but would increase plaintiff's per contract overhead to such a degree as to render the entire operation unprofitable.

The reduction of plaintiff's insulation business by 40% turned a profitable stream of income to a loss. Thus the conspiracy resulted in the destruction of the plaintiff's "going concern" or "good will" or "fair market value".

The impact of the formation of Tri-

City on plaintiff's business was immediate.

> "***the antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct.***" Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 766, 782 (3rd. Cir. 1967) Modified on other grounds 392 US 481.

The District Court's suggestion that the injured party is obligated to repair the damage caused by the wrongdoer is not in conformance with general tort law or the anti-trust laws. Even if plaintiff could have built a new business it does not mean that defendants would not be responsible for the destruction of the old business.

III

The Court of Appeals has erroneously held that the instant acquisition by corporate officers for the benefit of their corporation is not an indirect acquisition under Clayton Act §7. The facts indicate, however, that the acquisition by Robert Tougher and Harry E. Tompkins Sr., of Tri-City was an indirect acquisition by their corporations within the meaning of 15 USC §18. The Court of Appeals found that their purpose was to depress prices. Tri-City was created for the benefit of the Tougher and Tompkins Companies.

Shareholders of a corporation purchasing a business for the benefit of that corportion violate Clayton Act §7 if the acquisition tends to lessen com-

petition in a section of the country. GAF Corp. v. Circle Floor Co. 329 F. Supp. 823, 829 (SDNY 1971), aff'd 463 F. 2d 752 (2d. Cir. 1972), cert. dismissed, 413 U.S. 901 (1973). The findings of the Court of Appeals irrefutably establish that Tri-City was formed to benefit Tougher Co. and Tompkins Co. by two persons who receive their livelihood from those companies. It was error for the Court of Appeals to further require the plaintiff to trace the monies used to form Tri-City from the coffers of Tougher and Tompkins Companies.

Thereafter, for the next four years none of the Albany based insulation subcontractors received subcontracts in the three county Albany area from Tougher Co. or Tompkins Co. This represents a significant market share averaging over $1,000,000.00, more than 23% of the total insulation contracts let in that section of the country. It is a patent lessening of competition. It is also a per se violation of Sherman Act §1. International Salt Co. v. United States, 332 U.S. 392, 396.

IV

This is the only case known to petitioner in which a Federal Court has, in effect, exonerated a combination upon the grounds that it was only engaged in a price fixing scheme, i.e. to drive down market prices.

The issues presented here are of great importance to the protection of

competition and the public in regional markets. The construction industry is a major economic activity in most regional markets. The decisions of the Courts below so impede the private enforcement of anti-trust actions in regional markets as to effectively "chill" such efforts. This is so in the Albany, New York regional market.

If the Court of Appeals' decision herein remains free from review, competition in the construction industry will suffer as it becomes known that competing prime contractors may combine in joint ventures for the purpose of driving prices down to "fair and reasonable" levels.

The Justice Department has recently recognized that regional markets are in need of protection.:

> "What we can expect are changes in emphasis tending to direct our rather limited enforcement resources toward those areas in which, as far as we can tell, the real problems exist in today's economy***
> ***what we are seeing lately, however, is that the word has not necessarily trickled down to businessmen operating on a regional or local level.***
> Anti-Trust and Trade Regulation Report No. 607, D-1 4/3/73

It is petitioner's view that if the activities complained of had been those of national corporations affecting national markets, a different

result would have obtained in the Lower Courts.

Those Americans who make their living in regional markets are entitled to the economic freedom which the anti-trust laws are intended to protect.

CONCLUSION

Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 79—September Term, 1974.

(Argued October 31, 1974 Decided January 21, 1975.)

Docket No. 73-2370

HUDSON VALLEY ASBESTOS CORPORATION,

Plaintiff-Appellant,

—against—

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., and HARRY E. TOMPKINS, JR.,

Defendants-Appellees.

Before:

LUMBARD, MOORE and MANSFIELD,

Circuit Judges.

Appeal in a private antitrust treble damage action from a judgment entered in the United States District Court for the Northern District of New York, Lloyd F. MacMahon, *Judge,* of the Southern District of New York, sitting by designation, dismissing plaintiff's complaint after a trial before the Court sitting without a jury.

Affirmed.

LAMBERT L. GINSBERG, Troy, N.Y. (Pattison, Herzog, Sampson & Nichols, P.C., of Counsel), *for Appellant.*

JOSEPH W. BURNS, New York, N.Y. (Burns, Van Kirk, Greene & Kafer, Martin J. Neville, of Counsel), *for Appellees.*

MOORE, *Circuit Judge:*

Hudson Valley Asbestos Corporation (Hudson Valley) brought this private antitrust treble damage action alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and sections 3 and 7 of the Clayton Act (15 U.S.C. §§ 14, 18). The principal defendants were Tougher Heating & Plumbing Co., Inc. (Tougher), E.W. Tompkins Co., Inc. (Tompkins), Robert Tougher and Harry E. Tompkins, Sr., the respective presidents of these companies, and Tri-City Insulation Company, Inc. The case was tried before the United States District Court for the Northern District of New York, which rendered an opinion and judgment in favor of the defendants. Thereupon Hudson Valley appealed. We affirm.

In 1922 Marshall Pursel formed Hudson Valley in Albany, New York, as an insulation contracting business. Although the insulation aspect of the company became far less important as the firm expanded into other areas, accounting for an annual average of approximately 5% of net sales by 1960, Hudson Valley continued to engage in insulation contracting until September 30, 1961.

Tougher and Tompkins are two plumbing and heating contractors also located in the Albany area. In the course of their business Tougher and Tompkins, as prime contractors, would submit bids to perform the plumbing and heating work on a certain job. Their bids would be based on the bids submitted to them by various subcontractors, including insulation subcontractors such as Hudson Valley. If Tougher or Tompkins was awarded the prime contract, it would in turn either award the insulation sub-

contract to the lowest bidder or give another company an opportunity to match the lowest bid. Between 1957 and 1961 Tougher and Tompkins together accounted for over 40% of the dollar volume of Hudson Valley's insulation contracts.

In May 1961 Robert Tougher and Harry E. Tompkins, Sr. first discussed the possibility of forming their own insulation subcontracting company. They were dissatisfied with the subcontractors with whom they had been dealing and wanted to obtain fair and reasonable prices for insulation work. A month later they each invested $5,000 and founded defendant Tri-City, which was incorporated on June 29, 1961 and commenced doing business on July 31. Shortly thereafter, in August 1961, Henry Kuhl, who had single-handedly managed Hudson Valley's insulation business for many years, sought employment at Tri-City and signed an employment contract for about 40% greater salary than he had received at Hudson Valley plus an incentive bonus of 10% of profits. Pursel made the decision to terminate the insulation business almost immediately, and voluntarily returned two already existing insulation subcontracts to Tougher.

The gravamen of the plaintiff's complaint is that antitrust violations committed in connection with the formation and operation of Tri-City drove Hudson Valley out of the insulation business by eliminating Tougher and Tompkins as potential customers. However, the district court explicitly found that Hudson Valley voluntarily terminated its insulation contracting business and that there was no causal connection between the alleged antitrust violations and this business decision. Particularly in light of the departure of plaintiff's long-time manager and the rather precipitous termination soon thereafter, we are unable to say that this finding was erroneous.

Failure to prove that it was injured "by reason of" the defendants' alleged antitrust violations is of course sufficient to defeat Hudson Valley's claims. Clayton Act § 4, 15 U.S.C. § 15 (1970); *see Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). Nevertheless, we shall briefly review the antitrust allegations, which we find to be without merit in any event.[1]

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1 The district court found that the plaintiff had failed to prove that the interstate commerce requirements of the Sherman Act had been met, but the court nevertheless went on to consider the substance of the allegations. We disagree with the jurisdictional ruling. The reach of the Sherman Act is the full extent of Congress' broad commerce power. *E.g., Gulf Oil Corp.* v. *Copp Paving Co.*, 43 U.S.L.W. 4059, 4062 (U.S. Dec. 17, 1974); *United States* v. *Southeastern Underwriters Association*, 322 U.S. 533, 558 (1944); *Rasmussen* v. *American Dairy Association*, 472 F.2d 517, 521 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). Thus, a holding that certain activity is outside the reach of the Sherman Act constitutes a determination that the conduct is beyond Congress' power to regulate. Yet the proposition that courts have placed few limits on the commerce power needs little documentation. *E.g., Katzenbach* v. *McClung*, 379 U.S. 294 (1964). Congress may regulate purely intrastate activity as long as the conduct has a substantial effect on interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942). Although in this case all contracting work involved was done only in New York State, Hudson Valley, while it was still operating, Tri-City, and other insulation contractors continually purchased substantial quantities of insulation materials from suppliers located outside New York for delivery and installation at work sites. Thus, the formation of Tri-City and the demise of Hudson Valley caused at least a diversion in the flow of interstate goods. Moreover, the plaintiff's allegations concerning a concerted refusal to deal, price fixing, and conspiracy to monopolize, had they been proved, certainly could have had a substantial effect on the interstate shipment of insulation materials. Presumably the level of competition among contractors would affect the price at which contracting services were offered, and this would in turn affect the level of construction activity and hence the demand for insulation materials. Under these circumstances we are unwilling to say that such anticompetitive conduct as is alleged by Hudson Valley is beyond congressional control.

The district court did not expressly consider whether the jurisdictional requirements of Clayton Act §§ 3 and 7 had been met (although by implication the court was of the view that they had not, since the Clayton Act of course cannot reach beyond what the Constitution

Hudson Valley alleges that the defendants violated section 1 of the Sherman Act by engaging in both price fixing and a concerted refusal to deal with insulation subcontractors other than Tri-City. Either allegation, if true, would constitute a per se violation of Section 1. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing) *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (concerted refusal to deal).

With respect to the price-fixing claim, the district court found no evidence that any such scheme existed. Although Tri-City was formed out of apparent dissatisfaction with the high level of the bids Tougher and Tompkins were receiving from insulation contractors, there is no indication that they conspired to set the level of Tri-City's bids. Indeed, Kuhl was apparently given a free hand to determine the figure Tri-City would submit on any particular job. His instructions were only to submit a fair price, which would reflect his costs plus some allowance for profit.

The contention that Tougher and Tompkins together refused to deal with insulation subcontractors other than Tri-City is also not supported by the evidence. Hudson Valley relies on statistics showing that between 1961 and 1965 Tri-City received all but one of the insulation subcontracts awarded by Tougher and Tompkins in Albany, Sche-

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allows). It is unclear whether the Sherman Act and the Clayton Act are coextensive in this respect. In contrast to the language contained in the Sherman Act § 1 (prohibiting conduct "in restraint of trade or commerce among the several States or with foreign nations . . . ."), Clayton Act §§ 3 and 7 prohibit activities by persons and corporations "engaged in commerce." The Supreme Court recently declined to decide whether this difference in language gives the Clayton Act provisions a jurisdictional reach that is more limited than that of the Sherman Act. *Gulf Oil Corp.* v. *Copp Paving Co., supra* at 4061. Since Hudson Valley's Clayton Act allegations fall outside of the statute for other reasons, however, *see* discussion *infra*, we need not decide the reach of the Clayton Act and, if it be narrower than that of the Sherman Act, whether the activities involved in this case would fall within it.

nectady, and Rensselaer Counties. At the same time, however, the three other insulation subcontractors in this area had refused to submit bids to Tougher and Tompkins, and when J. F. Swick Insulation Co., a new entrant in 1966, in competition with Tri-City, did submit a bid to Tougher, Swick received the award. Thereafter, the other insulation contracting companies also began to submit successful bids to Tougher and Tompkins. In addition, within the eleven-county geographic market for insulation subcontracting that the district court found to be appropriate,[2] companies other than Tri-City were awarded subcontracts despite the fact that Tri-City had submitted competing bids.

Although Hudson Valley's allegations under section 2 of the Sherman Act are not framed with the utmost clarity, their thrust is that Tougher and Tompkins unlawfully conspired to monopolize. Unfortunately, the market at which the alleged conspiracy was supposedly directed is not precisely defined.[3] The district court found that plumbing and

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2 Hudson Valley contends that the district court's designation of an eleven-county area as the proper geographic market for insulation subcontracting was improper. According to Hudson Valley a three-county area immediately around Albany is the correct geographic market.

The definition of the relevant geographic market requires "careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). We cannot say that the district court used improper means to arrive at the appropriate market. The court relied mainly on statistics showing that a substantial proportion of Hudson Valley's insulation contracts were outside the three-county area but within the eleven-county area ultimately adopted. There was also evidence that Tri-City, after it was formed, competed in the eleven-county area. Furthermore, there was testimony that even for jobs in Albany insulation contractors outside the city were invited to submit bids.

3 At one point in its brief the plaintiff refers to the success of Tougher and Tompkins in receiving for Tri-City *"a monopoly of the business controlled by their companies . . . ."* (Appellant's Brief at 31). This is of course not a market at all.

heating contracting and insulation contracting respectively constituted distinct submarkets. Whether the plaintiff views both of these submarkets as the target of the conspiracy is not clear. In any event, it is plain that the district court's finding that there was no section 2 violation was proper. With respect to the plumbing and heating contracting submarket, there were sixteen companies located in the three counties around Albany alone, and the district court found that competition was vigorous both before and after the formation of Tri-City. In the insulation contracting submarket there were, in addition to Tri-City, three companies located in Albany—Armstrong Cork, B.A. Keasbey, and Johns-Manville. All were strong nationally-based concerns. Thus, it is patently obvious that the defendants had no power to control either market. Although specific intent to monopolize, and not monopoly power, is the essential element when a conspiracy to monopolize is involved, *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961), the absence of any likelihood of success is certainly some evidence on the question of whether such specific intent existed. And here the futility of any effort to monopolize either submarket as shown by the evidence referred to above, coupled with the repeated denials of the defendants, amply supports the finding of the district court.

Hudson Valley's contention under Clayton Act § 3 is that the defendants agreed that Tri-City would supply all the insulation subcontracting needs of Tougher and Tompkins. This requirements contract, Hudson Valley argues, violated section 3 by foreclosing a substantial share of the market to competitors of Tri-City. *See, e.g., Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961).

No such contract existed in writing, and in light of the evidence already discussed with respect to the alleged concerted refusal to deal, it is apparent that there was not

even an informal understanding to that effect. More importantly, however, section 3 applies only to contracts "for the sale of goods, wares, merchandise, machinery, supplies or other commodities . . . ." 15 U.S.C. § 14. As found by the district court, "[t]he insulation contracting business consists primarily of the service of covering pipes and ducts, not supplying materials." That insulation subcontractors may provide the insulation materials which are installed is incidental to their principal function, which is to provide services. It is, of course, well settled that section 3 does not apply to sales of services. *See United States* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545, 554 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

The plaintiff's claim under Clayton Act § 7 is also outside the bounds of the statute. Hudson Valley argues that the formation of Tri-City was a joint venture which substantially lessened competition. Although section 7 does apply to joint ventures, *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), the provision expressly reaches only acquisitions, direct or indirect, by corporations. *See Bender* v. *Hearst Corp.*, 152 F.Supp. 569, 578-79 (D. Conn. (1957)), *aff'd*, 263 F.2d 360 (2d Cir. 1959). Here Tri-City was formed not by two corporations but by two individuals, Robert Tougher and Harry E. Tompkins, Sr. Hudson Valley seeks to avoid the import of this shortcoming by arguing that the venture was in fact an indirect acquisition by Tougher and Tompkins.

Section 7 may apply in some circumstances to corporations when stockholders make an acquisition on its behalf. *GAF Corp.* v. *Circle Floor Co.*, 329 F.Supp. 823, 829 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973). But this case does not present such a situation. The money to form Tri-City was invested by Robert Tougher and Harry E. Tompkins, Sr.

There is no allegation that it came from their corporations. Although these two men were the presidents and controlling shareholders of Tougher and Tompkins respectively, substantial portions of the companies were owned by others and only one other shareholder of either company became a shareholder of Tri-City. Nor is there any indication that Tougher and Tompkins either planned to control or did control the activities of Tri-City. In short, it was the investments of Robert Tougher and E.W. Tompkins Sr. which were at stake in the formation of Tri-City and under those circumstances section 7 does not apply.

Having considered the points raised by the appellant, we find no basis for disturbing the judgment of the district court. Accordingly, the judgment of the district court is hereby affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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HUDSON VALLEY ASBESTOS CORPORATION,
Plaintiff,

against

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., AND HARRY E. TOMPKINS, JR.,
Defendants.

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CIVIL ACTION NO. 10007

MEMORANDUM

MacMAHON, District Judge. *

This private treble damage action, alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 3 and 7 of the Clayton Act (15 U.S.C. §§ 14 and 18), was tried before us without a jury.[1] Plaintiff claims that defendants drove it out of the insulation contracting business by forming a new insulation contracting company and awarding all of insulation contracts of Tougher Heating & Plumbing Co., Inc. (Tougher Co.) and E.W. Tompkins Co., Inc. (Tompkins Co.) to the new company, thereby foreclosing plaintiff from a substantial share of the market.

Plaintiff Hudson Valley Asbestos Corporation (Hudson Valley) was formed in 1922 by Marshall A. Pursel as an insulation contracting business.[2] Over the years,

* Of the Southern District of New York sitting by designation.

Hudson Valley expanded into radio, television and appliance sales, and by 1957 the insulation contracting business accounted for only 5.3% of plaintiff's net sales. This varied over the next four years from a high of 8% in 1958 to a low of 4.5% in 1960.[3] Hudson Valley terminated its insulation contracting business in September, 1961.

Pursel remained active in Hudson Valley, but as it had largely expanded into other fields he had for many years delegated complete authority for the insulation business to Henry Kuhl.[4] Kuhl was the only Hudson Valley employee assigned full time to the insulation business. He received requests for bids and computed and submitted them to the plumbing and heating contractors. When Hudson Valley was awarded a contract, Kuhl ordered the manpower and the materials for the job and supervised at the jobsite.[5]

Defendants Tougher Co. and Tompkins Co. were plumbing and heating contractors. Plumbing and heating contractors solicited bids from the insulation contractors before the award of the prime contract. After the award of the prime contract, the plumbing and heating contractor in turn, awarded the insulation subcontract. The subcontract was usually awarded to the lowest bidder, although in some cases a contractor would be given the opportunity to meet the lowest bid. Tougher Co. accounted for 38.48% of the dollar amount of Hudson Valley's insulation contracts from 1957 through 1960, while for the same period Tompkins Co.accounted for only 4.8%.[6]

Defendants Robert Tougher (Tougher) and Harry E. Tompkins, Sr. (Tompkins) are

the respective presidents of Tougher Co. and Tompkins Co.[7] In May 1961, Tougher and Tompkins discussed the possibility of forming their own insulation contracting company in order to obtain reasonable, fair and competitive prices for insulation work.[8] They later agreed to invest $5,000 each to establish the business. Defendant Tri-City Insulation Company, Inc. (Tri-City) was incorporated as a result on June 29, 1961.

In August 1961, Pursel learned of Tri-City's formation.[9] Prior to this, Kuhl had approached Tougher and Tompkins and asked for a position with Tri-City.[10] Shortly, thereafter, Kuhl told Pursel that he had been offered a job with Tri-City as its manager at higher wages than Hudson Valley paid, plus 10% of Tri-City's profits.[11] Pursel could not match the offer and made no effort to dissuade Kuhl from taking the job.[12] Kuhl accepted Tri-City's offer a few days later.[13]

According to Pursel, Kuhl told him that Tougher Co. had cancelled two contracts with Hudson Valley representing a total of $114,000.[14] Tougher, however, testified that the two contracts had not been cancelled but had been voluntarily returned by Hudson Valley to Tougher Co. which accepted the return as an accommodation to Hudson Valley because Kuhl had informed Tougher Co. that Hudson Valley was terminating its insulation business.[15] Although the contracts would have been enforceable, Pursel did nothing to enforce the contracts or to recover damages for their breach. Indeed, Pursel admitted that he never mentioned the cancellation of these contracts to Tougher.[16] Only Kuhl could have corroborated Pursel's hearsay testimony but Kuhl was not called as a witness. In light of all the circumstances, we therefore credit

Tougher's testimony and reject Pursel's as to the cancellation of the contracts and find that they were voluntarily rescinded by Hudson Valley.

Kuhl and Pursel believed that Tougher Co. would award all its insulation contracts to Tri-City and that without those contracts Hudson Valley could not sustain its insulation contracting business.[17] However, neither Pursel nor Kuhl investigated the possibility of replacing the anticipated loss of business although Hudson Valley had outstanding contracts and continuing business relationships with several other prime contractors. In fact, Pursel talked to Kuhl about the possibility of Tri-City performing contracts awarded to Hudson Valley by prime contractors other than Tougher Co. and Tompkins Co.[18]

Plaintiff now argues that the "core of [plaintiff's] case" is that the "elimination of plaintiff from the market share controlled by defendants destroyed plaintiff's insulation business." The evidence, however, indicates that plaintiff voluntarily terminated its insulation contracting business.[19] Pursel made a business decision to stop submitting bids for insulation contracting work. In short, plaintiff has not shown any causal connection between any alleged antitrust violation of defendants and the termination of plaintiff's insulation contracting business.[20] Hudson Valley simply withdrew from the competitive arena. The antitrust laws are concerned not with the protection of competitors but with competition.[21] Nevertheless, we shall review plaintiff's antitrust claims.

The threshold tasks here are the determination of the relevant line of commerce

and the relevant geographic market.[22] These determinations will allow us to analyze the impact, if any, of defendants' acts upon competition.[23]

THE PRODUCT MARKET

The relevant product market must conform to competitive reality.[24] A broad product market may, for antitrust purposes, be subdivided. These submarkets can be determined by an examination of "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[25] These indicia are not exhaustive; all need not be satisfied, nor is any one considered to be more important than any other.[26] In short, the product market must be determined in light of the facts peculiar to the particular case.[27]

The contracting business is dependent upon decisions to build. These decisions are not made by the contractors themselves. Hence, the broad product market is that between the owners (the decision makers) and the contractors and subcontractors necessary to complete construction. There are obviously several submarkets which may be further divided into still other submarkets. An arrangement between these different levels of submarkets is clearly vertical.[28]

The plumbing and heating contracting service constitutes one such submarket. This is separate from other types of contracting services. The plumbing and heating contractors, in turn, are the suppli-

ers of contracts to the insulation contractors who also provide an unique service. The insulation contractors submit a total bid for the entire service and the bid is usually awarded to the lowest bidder. The contract specifies the materials required and the quantities required; there is no extensive expertise required to compute the insulation bid.

Labor, in this situation, is furnished under an agreement with the insulation contractor by Local 40 of the International Association of Heat and Frost Insulators and Asbestos Workers; the local does not furnish labor unless the work has been subcontracted to an insulation contractor.[29] Labor costs, therefore, are the same for all insulation contractors.[30] The insulation contractors must compete by cutting costs on the charges for supervisory and office work and for the service of providing materials.

The prime contractors are clearly service-minded businessmen. Tompkins did not know where Tri-City obtained insulation supplies nor what they cost.[31] The plumbing and heating contractors do not receipt for, inspect, install or safeguard the insulation materials. It thus appears that all risks attaching to the materials is on the insulation contractor. The insulation contracting business consists primarily of the service of covering pipes and ducts, not supplying materials. All the insulation contractors conduct their business in the same manner. There is no substitute for the type of service provided by insulation contractors, but the services provided by one may be readily substituted by another and are there-

fore fungible. Cost, i.e., low bid, is thus the only consideration dictating the choice of insulation contractors. Since the costs of material and labor are the same for all the insulation contractors, the difference in pricing the service controls the bid. Based on the industry recognition and its peculiar characteristics and specialized vendors, we think it clear that the product market between the plumbing and heating contractors and insulation contractors is a separate submarket consisting of insulation service contracts.

The insulation contractors enter a third sub-market after they have been awarded a contract. This market consists of their purchases of insulation materials from suppliers. Little, if any, evidence was offered concerning this market. We think it clear, however, that it consists of insulation materials shipped from out-of-state suppliers directly to the job-site designated by the buyer-insulation contractor.

THE GEOGRAPHIC MARKET

Having determined the product sub-markets, it is necessary to determine the geographic market for each one. The geographic market is the area in which the same parties effectively compete for the same product.[32] It is not "the smallest or largest possible geographic area" but rather "the smallest separate competitive arena big enough to accommodate most of the customers." [33]

We first consider the geographic market for plumbing and heating contractors.

Tougher Co. and Tompkins Co. effective-

ly competed with other prime plumbing and heating contractors in an area stretching from the Vermont border west to Oneonta, New York. Both Tougher Co. and Tompkins Co. had contracts and competed between themselves and with others in an area from Kingston, New York, north to Plattsburgh, New York, and from the Vermont border west to Oneonta, New York. Apparently both Tougher Co. and Tompkins Co. did occasional work outside the area and outside contractors occasionally competed within the area, but the area of effective competition is the geographic area described above.

The geographic market for the services of insulation contractors is much larger than the three-county Albany area of Albany, Rensselaer and Schenectady Counties which plaintiff proposes.

Plaintiff did a great deal of work and competed with other insulation contractors beyond the three-county Albany area. In 1957, Hudson Valley had contracts totalling $56,495 in the counties of Essex, Columbia, Herkimer, Oneida, Saratoga, Schoharie, Ulster and Washington. In the three counties of Albany, Rensselaer and Schenectady, the total dollar amount of contracts for the same year was only $37,870.[34] The percentage of Hudson Valley contracts performed outside of the three-county Albany area in 1957 was 60.4%; in 1958, 32.2%; in 1959, 16%; and in 1960, the last full year in which Hudson Valley continued its insulation contracting business, 30.9%. These are substantial percentages of Hudson Valley's total insulation work and indicate that Hudson Valley effectively competed in

the eleven counties mentioned. We, therefore, reject plaintiff's argument that the geographic market is limited to the three-county Albany area in favor of this larger geographic area.

Finally, the insulation materials submarket is clearly interstate. These materials, by order of the insulation contractor, are for the most part shipped in interstate commerce directly to the jobsite.

THE EFFECT ON COMPETITION

We turn now to the possible effect on competition in the three submarkets that Tri-City's formation may have had.

Tougher Co. and Tompkins Co. continued to compete against each other and the many other plumbing and heating contractors in the market. There were at least sixteen competitors with offices in the Albany area, and when there were large contracts to be awarded other competitors would bid.[35] Competition in this market never lessened. Lively competition for prime contracts does much to ensure lively competition among the subcontractors. The large number of competitors in the plumbing and heating market ensures a variety of contract suppliers. The competition among prime contractors continued unaffected by the formation of Tri-City.

Competition also remained vigorous among the insulation contractors. Keasbey, Armstrong Cork and Johns-Manville were large, nationwide concerns. Tri-City was not, but it was able to compete effectively, as was Hudson Valley before Pursel's decision to

terminate its insulation contracting business.

Plaintiff's insistence that Tougher Co. and Tompkins Co. established Tri-City in order to gain an edge for Tougher Co. and Tompkins Co. is not supported by the evidence. Plaintiff offered no evidence that Tri-City consistently underbid other concerns through a price-fixing arrangement with Tougher Co. and Tompkins Co. Indeed, all price-fixing claims were dropped during the trial. Nor did plaintiff establish that Tri-City furnished "no profit" insulation to Tougher Co. and Tompkins Co. Plaintiff claims that in 1961, the year Tri-City was formed, Tougher Co. and Tompkins Co. controlled 44% of the insulation contracts in the three-country Albany area. The average, however, for the next four years dropped to 23-4/5%. This hardly indicates that Tri-City gave Tougher Co. and Tompkins Co. an edge over its competitors.

In light of the much larger geographic market which we have found relevant, plaintiff's figures are probably unduly favorable to plaintiff's case. Furthermore, Tri-City dealt with many competitors of Tougher Co. and Tompkins Co. and submitted the same bid to Tougher Co., Tompkins Co. and their competitors.[36] Clearly, Tri-City was not managed to obtain an edge for Tougher Co. and Tompkins Co.

The evidence did establish that Tougher Co. and Tompkins Co. awarded all their insulation contracts in the three-county Albany area to Tri-City, but both companies awarded contracts to other insulation contractors within the larger geographic market which we have found, although Tri-City

competed in that market.[37]

The evidence also established that Tougher Co. and Tompkins Co. awarded all of their contracts to Tri-City in the three-county area because the other insulation contractors, after the formation of Tri-City, refused to make bids to Tougher Co. and Tompkins Co. in competition with Tri-City.[38] Their refusal to bid was based on an erroneous assumption that Tougher Co. and Tompkins Co. would favor Tri-City but their supposition was unfounded. When the J. F. Swick Insulation Co. entered the market in 1966, Swick submitted bids to Tougher Co. and Tompkins Co. in competition with Tri-City and was awarded contracts. After this, the other insulation contractors began to bid successfully on contracts with Tougher Co. and Tompkins Co.[39] The evidence thus fails to establish that competition in the insulation services submarket was impaired or threatened by the formation of Tri-City.

Finally, the insulation materials market is unaffected. The formation of Tri-City did not change the flow of insulation materials into New York State. The amount of materials needed to complete an insulation job is dictated by the amount of piping and ducts to be covered which, in turn, is dictated by the building plans. The decision as to the insulation materials needed was thus not made by the insulation contractor. Neither Tri-City, nor through it Tougher Co. and Tompkins Co. was in a position to affect, much less to control, the amount or price of insulation materials or to impede or affect competition in this market. The flow of insulation materials to the jobsite thus

continued unimpeded after the formation of Tri-City.

SHERMAN ACT §§1 AND 2,
15 U.S.C.§§1 and 2.

In the light of our market analysis, it is clear that the Sherman Act is not applicable. The Sherman Act applies only when the acts complained of are in the flow of interstate commerce or when the acts complained of substantially affect interstate commerce.[40]

Here, plaintiff complains of the formation of Tri-City by Tougher and Tompkins and the allegedly exclusive awarding of contracts to Tri-City by Tougher Co. and Tompkins Co. This activity is wholly intra-state. The only inter-state commerce alleged or shown is the shipment of insulation material into the state by out-of-state suppliers. However, the acts complained of are not in that interstate market. Thus, even though Tri-City's formation may have had some effect on the termination of plaintiff's insulation contracting business, the impact, if any, was entirely on the intrastate market. Its formation was in no way directed toward plaintiff's interstate business.[41]

Plaintiff places great weight upon Las Vegas Merchant Plumbers' Ass'n v. United States, 210 F. 2d 732 (9th. Cir.), cert. denied, 348 U.S. 817, rehearing denied, 348 U.S. 889 (1954). There, the conspiracy involved contractors and a trade union official. The plumbing contractors who ordered and used the materials involved conspired among themselves to

fix prices by means of a system of bidding under which the contract was awarded to a designated contractor. The Court characterized the plumbing contractors as conduits for the interstate shipment of supplies. The "conduits" themselves had the power effectively to boycott any wholesaler who sold or offered to sell supplies at prices and terms not agreeable to the plumbing contractors. They also had the power, with the aid of a union official, to stop construction at a jobsite. This power had an obvious restraining effect on interstate commerce. No such power has been shown here in the relevant product and geographic markets. The acts complained of here were not in the flow of interstate commerce.

Since the acts complained of were not in the flow of interstate commerce, plaintiff must show that they had a substantial effect on commerce to bring this case within the reach of the Sherman Act.[42] Here, the effect on interstate commerce is insubstantial, if not non-existent. We have already shown that the amount of insulation materials to be used is dictated by the job and that there is no indication that commerce in these materials has been affected as to amount, price, competition or in any other respect. There is no proof that any of the defendants has any control or power in this interstate insulation materials market.

Since plaintiff has failed to show that the acts complained of are in interstate commerce or that the acts have had a substantial effect on interstate commerce, the claims asserted are not within

the jurisdiction of the Sherman Act.[43]

Even if the Sherman Act were applicable, we do not think that plaintiff has shown any violation of the Act. Section 1 of the Sherman Act prohibits only unreasonable restraints of trade unless the conduct complained of is a per se violation.[44] Plaintiff attempts to show a concerted refusal on the part of Tougher Co. and Tompkins Co. to trade with Hudson Valley and other competitors of Tri-City. There can be no question that group boycotts or concerted refusals to deal are per se violations.[45] There has been no showing of any refusal to deal here. Indeed, since the insulation contractors refused to submit bids to Tougher Co. and Tompkins Co., there is no direct evidence that those companies would refuse to consider such bids. Tougher and Tompkins both denied any agreement to refuse to deal. Both Tougher Co. and Tompkins Co. dealt with insulation contractors other than Tri-City within the relevant geographic market after Tri-City's formation, and Tri City made many over-the-counter purchases from Hudson Valley after Hudson Valley terminated its contracting business.[46] The entry of Swick into the market in 1966 and its success in obtaining contracts from Tougher Co. and Tompkins Co. is a strong indication that there was no concerted refusal to deal. The fact that after Swick's success, the other insulation contractors began to submit bids to Tougher Co. and Tompkins Co. and to be awarded contracts negates any inference that a concerted refusal ever existed.

Plaintiff also claims that Tri-City had a pool of all insulation contracts from

Tougher Co. and Tompkins Co., that all expenses were divided and that this resulted in a division of the market. This claim is unsupported. Tougher Co. and Tompkins Co. continued to compete vigorously against each other for plumbing and heating contracts. This necessitated continued competition for low bids from their subcontractors. Tri-City was managed by Kuhl without any interference and with little direction from Tougher or Tompkins and none at all from Tougher Co. or Tompkins Co.

Since plaintiff has failed to show a per se violation of the Sherman Act, it must show an unreasonable restraint of trade based on the facts peculiar to the business involved; the condition of the business before and after the alleged restraint; and the alleged restraint itself and its actual or probable effect.[47] Plaintiff has made no such showing here. We conclude, therefore, that plaintiff has failed to prove any restraint of trade occurred, much less an unreasonable one.

Under Section 2 of the Sherman Act, plaintiff must show monopoly power to support a claim of monopolization and specific intent to monopolize to support a claim of an attempt to monopolize.[48] We have previously noted that Armstrong Cork, R.A. Keasbey and Johns-Manville were strong local branches of nationwide insulation concerns. "Monopoly power is the power to control prices or exclude competition."[49] Tri-City alone, or with the aid of the other defendants, had no such power. The exclusive awarding of contracts by Tougher Co. and Tompkins Co. to Tri-City, as we have seen, was the result not of power to exclude competition

but of the failure of the other insulation contractors to submit bids. Moreover, because vigorous competition existed after the formation of Tri-City, there was no power to control prices. We find, therefore, that plaintiff has failed to establish that defendants monopolized or attempted to monopolize commerce.

Plaintiff has also failed to show any specific intent to monopolize. Tougher and Tompkins were consistent in their denials that monopoly was their purpose, and, as discussed above, the manner in which Tri-City was managed and its position in relation to Tougher Co. and Tompkins Co. and their competitors gives no indication that there was any specific intent to monopolize. Hence, plaintiff has failed to establish a Section 2 violation.

CLAYTON ACT §3,
15 U.S.C. §14

Plaintiff contends that Section 3 of the Clayton Act (15 U.S.C. §14) was violated by Tougher's and Tompkins' agreement to "purchase all their insulation subcontracts in the market from Tri-City" "in return for ... no profit insulation."[50]

Section 3 of the Clayton Act applies to "goods, wares, merchandise, machinery, supplies, or other commodities...".[51] The section does not apply to services. The nature of the insulation contracting business is the performance of services. But, assuming arguendo, that the insulation contractor is a seller of goods or supplies within the meaning of the Act, the only tying arrangement alleged is the tie of the sale of goods to the service of

installation. A tie-in contract of sales to services does not constitute a claim under Section 3 of the Clayton Act.[52]

CLAYTON ACT §7,
15 U.S.C. §18.

Plaintiff argues that the formation of Tri-City was an indirect corporate acquisition and that therefore Section 7 of the Clayton Act (15 U.S.C. §18) applies. Plaintiff further argues that Tri-City was formed solely to benefit Tougher Co. and Tompkins Co. and that the formation of Tri-City substantially lessened or tended to lessen competition.

Tougher and Tompkins established Tri-City with their own funds. Tougher Co. and Tompkins Co. had no part in Tri-City's incorporation. Since Section 7, on its face, applies only to acquisitions by corporations, it is doubtful whether the acts of the individuals Tougher and Tompkins in establishing Tri-City make this an indirect acquisition by Tougher Co. and Tompkins Co. However, if Section 7 does apply, plaintiff has failed to establish a violation.

Plaintiff relies on United States v. Penn Olin Chem. Co., 378 U.S. 158 (1964). There the Court focused on the potential competition by respondents before their joint venture. The relevant market there was oligopolistic (378 U.S. at 174), substantial assets and expertise were required for new entrants into that market, and only a few corporations could be considered potential competitors. Here, entry conditions and the competitive arena are totally different.

The insulation contracting business is easy to enter. Little skill is required and only minimal capital investment is needed as is demonstrated by the fact that a few ladders were the only equipment required by Hudson Valley for its insulation business. Swick entered the insulation contracting business in 1966 and has received several contracts from both Tougher Co. and Tompkins Co. Since all labor is assigned from the union hall after the insulation contract is awarded, the contractor has no overhead for labor cost. Hudson Valley had only one permanent employee working full time in its insulation business. The market is not oligopolistic but is one of many competitors. Tougher Co. and Tompkins Co. have many competitors in the plumbing and heating contracting business, as does Tri-City in the insulation contracting business. We have discussed other possible effects on competition above, and we find that competition in none of the three submarkets has been, or is likely to be, lessened substantially.

Finally, Hudson Valley's precipitous termination of its insulation business does not necessarily make Section 7 applicable, nor would it necessarily indicate a violation of Section 7. As noted above, we are concerned "with the protection of competition, not competitors."[54]

The foregoing memorandum constitutes this court's findings of fact and conclusions of law, in accordance with Rule 52, Fed. R.Civ. P.

Accordingly, defendants are entitled to judgment dismissing the action with

costs. Settle judgment on notice within ten (10) days.

Dated: Auburn, N.Y.
June 29, 1973

S/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

FOOTNOTES

1 Another claim alleging a violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §13(a), (c) and (f)), was dismissed.

2 Tr. A-228

3 Tr. A-321 to A-324; Defendants' Exhibit L.

4 Tr. A-229 to A-230.

5 Tr. A-232 to A-233.

6 Defendants' Exhibit D.

7 The action was dismissed at the trial as to the other named individual defendants. Tr. 142-143.

8 Tr. 204, 229, 249, 263, 268, 287.

9 Tr. A-246, A-499 to A-510.

10 Tr. 200-201, 250-252.

11 Tr A-247 to A-248; Defendants' Exhibit AL.

12 Tr. A-397, A-402.

13 Tr. A-249.

14 Tr. A-255 to A-256.

15 Tr. A-737, 257.

16 Tr. A-461, A-471 to A-472.

17 Tr. A-248.

18 Tr. A-435 to A-441.

19 Tr. A-269 to A-270, A-470 to A-471.

20 Billy Baxter, Inc. v. Coca-Cola Co., 431 F. 2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923, rehearing denied, 401 U.S. 1014 (1971).

21 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

22 United States v. Manufacturers Hanover Trust Co. 240 F. Supp. 867, 887 (S.D.N.Y. 1965).

23 United States v. E. I. du Pont de Nemours & Co., 353 U. S. 586, 593 (1957).

24 United States v. Continental Can Co., 378 U.S. 441, 452, (1964).

25 Brown Shoe Co. v. United States, supra, 370 U.S. at 325.

26 Handler, Fifteenth Annual Review of Antitrust Problems 1962, 17 Record of the Association of the Bar of the City of New York 411, 435 (1962).

27 Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

28 Brown Shoe Co. v. United States, supra, 370 U.S. at 323.

29 Tr. 188, 250.

30 Tr. 183.

31 Tr. 231.

32 Tampa Electric Co. v. Nashville Coal Co., supra.

33 United States v. Manufacturers Hanover Trust Co. supra, 240 F. Supp. at 901.

34 Defendants' Exhibits B, M; Plaintiff's Exhibits 1, 2.

35 Tr. 159-161.

36 Tr. 191-193, 220.

37 Tr. 260-261; Defendants' Exhibits N, O, AA.

38 Tr. 193-196, 258-259.

39 Tr. 196-198, 260-261.

40 United States v. Women's Sportswear Mfrs. Ass'n, 336, U.S. 460 (1949); Rasmussen v. American Dairy Ass'n, 472 F. 2d 517 (9th. Cir. 1972); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F. 2d 341 (9th. Cir. 1969).

41 Rasmussen v. American Dairy Ass'n, supra; Yellow Cab Co. of Nevada v. Car Employers, Automotive & Warehousemen, Local #881, 457 F. 2d

1032 (9th. Cir. 1972); Lieberthal v. North Country Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964).

42 United States v. Women's Sportswear Mfrs. Ass'n, supra; Rasmussen v. American Dairy Ass'n, supra; Sun Valley Disposal Co. v. Silver State Disposal Co. supra.

43 Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), which plaintiff cites, involved a different situation. There, the Court held that a mere change in the form of the commodity before it enters interstate commerce does not make the Sherman Act inapplicable. Our market analysis makes it clear that the prime contractors were not part of the sequence of interstate commerce. The prime contractor does not purchase materials but services. These services, rendered by the insulation contractor, are local. Furthermore, Mandeville Farms cannot be read to abolish the requirement of an adverse effect upon commerce.

44 United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

45 Klor's Inc. v. Broadway-Hale Stores,Inc., 359 U.S. 207 (1959).

46 Tr. A-464 to A-476.

47 Board of Trade of the City of Chicago v. United States, 246 U.S. 231,238 (1918).

48 United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); United States v. Consolidated Laundries Corp., 291 F. 2d. 563, 573, (2d. Cir. 1961).

49 United States v. E. I. du Pont de Nemours & Co., supra 351 U.S. at 391.

50 Plaintiff's Trial Brief, p. 42.

51 Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330 (E.D. La.), aff'd, 323 F. 2d 363 (5th. Cir. 1963).

52 Advance Business Systems & Supply Co. v. SCM Corp., 415 F. 2d 55 (9th. Cir. 1969), cert. denied,397 U.S. 920 (1970); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 554 (E.D. Pa. 1960), aff'd, 365 U.S. 567, rehearing denied, 365 U.S. 890 (1961).

53 Tr. A-286.

54 Brown Shoe Co. v. United States, supra, 370 U.S. at 320.

APPENDIX C

15 U.S.C. § 1

TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competiton under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or

between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. §15

SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. §18

ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of

another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate

commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its juris-

diction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

APPENDIX D

Testimony of Robert Tougher and Harry E. Thompkins, Sr., as to their bidding instructions to Henry Kuhl.

APPENDIX D

BY MR. BURNS:

Q. Tell the Court what the conversation was with Kuhl?

A. We told Kuhl that he should operate at a fair profit, not too much when he was only bidding to us, but not too low, either, so that he wouldn't lose money. That was the profit picture we set up with Kuhl. (By Robert Tougher)

Appendix to the Court of Appeals B-263

BY MR. GINSBERG:

Q. You wanted him to supply you with insulation materials at the lowest possible price and not make money?

A. I would say that is it. If he made money, of course, Kuhl did -- well, I don't know. He was much on his own, but we didn't want him to lose money. Put it that way. (By Robert Tougher)

Appendix to the Court of Appeals A-659

BY MR. GINSBERG:

Q. What's your policy, to discourage bids to others; isn't that what you said?

A. Yes.

Q. Well, I would like you to tell me what you said to him about that.

. . .

"THE WITNESS: We just said --

MR. BURNS: Who is 'we'?

THE WITNESS: Bob Tougher and myself, -- that we thought it would be silly for him to give prices out to certain competitors who we knew were chisellers

to -- because it would show at what price we were using, and, if nobody else was getting our prices -- that is, Tri-City's price, we might have a better edge.

BY MR. GINSBERG:

Q. Well, was Tri-City's price lower than the market?

A. I don't know. We assumed -- we hoped it was.

Q. Did you expect it was?

A. We didn't get any prices from the market, so how do we know?

. . . (By Harry E. Thompkins, Sr.) Appendix to the Court of Appeals A-766 and A-767

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1311

HUDSON VALLEY ASBESTOS CORPORATION,

Petitioner,

against

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., and HARRY E. TOMPKINS, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1311

HUDSON VALLEY ASBESTOS CORPORATION,

Petitioner,

against

TOUGHER HEATING & PLUMBING CO., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Second Circuit Court of Appeals has recently been reported at 510 F.2d 1140.

QUESTIONS PRESENTED

1. Does the petition warrant the issuance of a Writ of Certiorari in the instant case simply to review factual determinations made by a District Court, which were affirmed, in the absence of

any significant questions of federal antitrust law or its application.

2. Whether the decision of the Court of Appeals affirming the District Court determination that there was no violation of the Sherman Act and no causal connection between the alleged antitrust violations and petitioner's business termination warrants review.

3. Whether the decision of the Second Circuit that Section 7 of the Clayton Act was not applicable warrants review in the circumstances of this action.

COUNTERSTATEMENT OF THE CASE

Respondents shall highlight herein certain inaccurate and misleading statements of fact contained in the Hudson Valley petition.

1. Petitioner asserts that Hudson Valley competed for insulation subcontracts primarily in Albany, Rensselaer and Schenectady counties in the State of New York (Pet. 3).*

The geographic market as determined by the District Court for Hudson Valley included an additional eight counties (B-8). The Second Circuit affirmed this finding (A-6, ftnt 2).

2. Petitioner asserts that "in the year

*References to the pages of the Petition are (Pet.__), references to the pages of the Appendices contained in the Petition are (A__), (B__) etc.

Tri-City was formed Tougher Co. and Tompkins Co. together controlled 44% of the insulation contracts let in the counties of Albany, Schenectady and Rensselaer. For the next four years the average was over 23%.***This represented control of over $1,000,000 worth of insulation contracts." (Pet. 4)

The District Court stated as to these statistics "[i]n light of the much larger geographic market which we have found relevant, plaintiff's figures are probably unduly favorable to plaintiff's case." (B-10).

3. Petitioner asserts "The Court of Appeals found that Tougher and Tompkins, who had founded Tri-City for the purpose of depressing prices bid to these companies, instructed Tri-City's manager as to bidding. (A-5, Appendix D)" (Pet. 4).

There are several material misstatements of fact contained therein. First, the Court of Appeals stated that Tougher and Tompkins were "dissatisfied with the subcontractors with whom they had been dealing and wanted to obtain fair and reasonable prices for insulation work." (A-3)

The District Court decision adds to reasonable and fair the adjective "competitive" prices for insulation work (B-3)." These findings are significantly different from petitioner's blithe assertion that the purpose was to depress prices bid to these companies.

Furthermore, the Second Circuit expressly found:

> "there is no indication that they conspired to set the level of Tri-City's bids. Indeed, Kuhl was apparently given a free hand to

determine the figure Tri-City would submit on any particular job. His instructions were only to submit a fair price, which would reflect his costs plus some allowance for profit. (A-5)."

This last is obviously significantly different from petitioner's statement which implies that Tougher and Tompkins instructed Kuhl what to bid to their companies.

4. Petitioner asserts "The District Court found that subsequent to its formation Tri-City received all of the insulation subcontracts to the exclusion of other subcontractors of Tougher Company and Tompkins Company in the three-county area of Albany, Schenectady and Rensselaer." (Pet. 4)

Petitioner omits that directly following this sentence the District Court significantly added as part of the same sentence "but both companies awarded contracts to other insulation contractors within the larger geographic market which we have found, although Tri-City competed in that market." (B-10) The very next paragraph of the District Court opinion states:"The evidence also established that Tougher Co. and Tompkins Co. awarded all of their contracts to Tri-City in the three-county area because the other insulation contractors, after the formation of Tri-City, refused to make bids to Tougher Co. and Tompkins Co. in competition with Tri-City." (B-11) The Court of Appeals affirmed this specific finding, "At the same time, however, the three other insulation subcontractors in this area had refused to submit bids to Tougher and Tompkins..." (A-6) (Emphasis supplied)

ARGUMENT

I

Petitioner Fails to Present Any Grounds to Support the Issuance of a Writ of Certiorari

In essence, petitioner seeks a trial de novo in this tribunal for an antitrust complaint filed in 1964 which was tried as a non-jury case before the United States District Court for the Northern District of New York in 1972. The petition attempts to assert grounds bringing this action within the provisions specified in Rule 19(1)(b) of the Rules of Supreme Court of the United States and apparently attempts to assert additional grounds to support the issuance of writ of certiorari. Upon examination these grounds are illusory.

It has not been the usual practice of this Court to grant certiorari to review evidence or to discuss specific facts, U.S. v. Johnson, 268 U.S. 220, 227 (1925). The case was tried by the Court without a jury, and basic issues of fact were found in favor of the defendants. One basic issue of fact was petitioner's claim that Robert Tougher and Harry Tompkins had hired plaintiff's manager, Henry Kuhl away from it in August, 1961 as part of the conspiracy to destroy it. A second issue of fact was whether the Tougher Company had cancelled two contracts with petitioner, or whether petitioner voluntarily returned them to Tougher. A third issue of fact was whether petitioner was driven out of the insulation contracting business by actions of the defendants, or whether it voluntarily went out of that portion of its business (which was only about 5% of its total business. (B-2)

Pertinent holdings of the District Court on these issues of fact were:

> "Indeed, Pursel admitted that he never mentioned the cancellation of these contracts to Tougher. Only Kuhl could have corroborated Pursel's hearsay testimony but Kuhl was not called as a witness. In light of all the circumstances, we therefore credit Tougher's testimony and reject Pursel's as to the cancellation of the contracts and find that they were voluntarily rescinded by Hudson Valley."
>
> * * *
>
> "Plaintiff now argues that the 'core of [plaintiff's] case' is that the 'elimination of plaintiff from the market share controlled by defendants destroyed plaintiff's insulation business.' The evidence, however, indicates that plaintiff voluntarily terminated its insulation contracting business. Pursel made a business decision to stop submitting bids for insulation contracting work. In short, plaintiff has not shown any causal connection between any alleged antitrust violation of defendnats and the termination of plaintiff's insulation contracting business. Hudson Valley simply withdrew from the competitive arena. The antitrust laws are concerned not with the protection of competitors but with competition. Nevertheless, we shall review plaintiff's antitrust claims." (B-4) (Emphasis supplied)

The Second Circuit decision on these issues states:

"In May 1961 Robert Tougher and Harry E. Tompkins, Sr. first discussed the possibility of forming their own insulation subcontracting company.

* * *

Shortly thereafter, in August 1961 Henry Kuhl, who had single-handedly managed Hudson Valley's insulation business for many years, sought employment at Tri-City and signed an employment contract for about 40% greater salary than he had received at Hudson Valley plus an incentive bonus of 10% of profits. Pursel made the decision to terminate the insulation business almost immediately, and voluntarily returned two already existing insulation subcontracts to Tougher. (Emphasis supplied)

However, the district court explicitly found that Hudson Valley voluntarily terminated its insulation contracting business and that there was no causal connection between the alleged antitrust violations and this business decision. Particularly in light of the departure of plaintiff's long-time manager and the rather precipitous termination soon thereafter, we are unable to say that this finding was erroneous." (A-3)

Under the principle of U.S. v. Johnson, supra, there clearly is no compelling reason to review the facts here. However, since both the District Court and the Circuit Court of Appeals nevertheless did discuss the legal issues, defendants shall do so.

Petitioner claims that the Second Circuit

has (1) overruled "U.S. v. Socony Vacuum Oil Co. 310 U.S. 150 (1940) (Pet. 5) - when it has followed and relied upon that decision; (2) "abandoned the standing test of Billy Baxter Inc. v. Coca Cola Co. 431 F. 2d 183 (2d Cir. 1970) cert. denied 401 U.S. 923, thereby "conflicting" with the decisions of other Circuits (Pet. 6) - when it has followed and relied upon that decision, (3) "erroneously held...[that an] acquisition is not an indirect acquisition under Clayton Act §7" (Pet. 11) when its holding is patently correct, and (4) "exonerated a combination upon the grounds that it was only engaged in a price-fixing scheme, i.e., to drive down market prices" (Pet. 12) when it is clear that no such scheme existed as determined by the District Court and as affirmed by the Second Circuit.

II

The Second Circuit Correctly Followed and Applied the Rule of U.S. v. Socony Vacuum Oil Co. under Section 1 of the Sherman Act

Rule 19(1)(b) of this Court's Rules states that a writ of certiorari may issue upon a showing that a court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner apparently relies upon this ground in Point I of its "Reasons for Granting the Writ." (Pet. 5) It argues first that the Second Circuit "has sanctioned a combination of buyers formed for the purpose of depressing prices and has thus overruled U. S. v. Socony Vacuum Oil Co., 310 U.S. 150" (Pet. 5)

This is a specious issue. Petitioner tried this case under Section 1 of the Sherman Act as a concerted refusal to deal case. In fact, petitioner's trial brief failed to refer to any price-fixing issue. The issue was first raised in its appeal to the Second Circuit and the Second Circuit found that there was no evidence of any price-fixing scheme.

The Second Circuit expressly relied upon the Socony decision. Its opinion states:

> "Hudson Valley alleges that the defendants violated section 1 of the Sherman Act by engaging in both price fixing and a concerted refusal to deal with insulation subcontractors other than Tri-City.

Either allegation, if true, would constitute a per se violation of Section 1. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing) Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959) (concerted refusal to deal).

With respect to the price-fixing claim, the district court found no evidence that any such scheme existed. Although Tri-City was formed out of apparent dissatisfaction with the high level of the bids Tougher and Tompkins were receiving from insulation contractors, there is no indication that they conspired to set the level of Tri-City's bids. Indeed, Kuhl was apparently given a free hand to determine the figure Tri-City would submit on any particular job. His instructions were only to submit a fair price which would reflect his costs plus some allowance for profit." (A-5) (Emphasis supplied)

The District Court stated:

"Indeed, all price-fixing claims were dropped during the trial." (B-10)

The touchstone of price-fixing is the creation of an artificial price structure. As this Court stated in Socony, "market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of...prices by free competition above." (at p. 233) No artificial price structure existed which could be attributed to the respondents.

Petitioner failed at the trial to offer

any evidence that "prices" were fixed at or below a competitive market price and there is no reference by petitioner in its brief to any specific kind of "fixed" price or what the competitive price would have been absent the alleged conspiracy. There is no evidence to support petitioner's assertion that Tri-City was formed "for the stated purpose of depressing the price bid to Tougher Co. and Tompkins Co." (pp. 4 and 6) On the contrary, the Second Circuit stated: "there is no indication that they conspired to set the level of Tri-City's bids." (A-5) The District Court found that petitioner "offered no evidence that Tri-City consistently underbid other concerns through a price-fixing arrangement with Tougher Co. and Tompkins Co." (B-10)

Respondents agree with petitioner's statement that "it is a per se violation for buyers to refuse to trade for the purpose of coercing sellers to deal at a price fixed by buyers." (Pet. 6) However, petitioner's statement that "[i]t is clear that Tougher Co. and Tompkins Co. would not deal with insulation subcontractors other than Tri-City unless they met the depressed prices dictated by the combination" (Pet. 6) "simply ignores the Second Circuit's review of that very issue. It concluded that "[t]he contention that Tougher and Tompkins together refused to deal with insulation subcontractors other than Tri-City is also not supported by the evidence." (A-5) Similarly, the District Court found:

> "The evidence also established that Tougher Co. and Tompkins Co. awarded all of their contracts to Tri-City in the three-county area because the other insultion contractors after the formation of Tri-City, refused to make

bids to Tougher Co. and Tompkins Co. in competition with Tri-City. Their refusal to bid was based on an erroneous assumption that Tougher Co. and Tompkins Co. would favor Tri-City but their supposition was unfounded." (B-11)

* * *

"There has been no showing of any refusal to deal here. Indeed, since the insulation contractors refused to submit bids to Tougher Co. and Tompkins Co., there is no direct evidence that those companies would refuse to consider such bids." (B-14)

Petitioner in essence simply disagrees with the findings of fact by the District Court and seeks to convince this Court that the Second Circuit affirmance was erroneous in spite of no supporting evidence in the record.

These "issues" are clearly not such as to warrant the issuance of a writ of certiorari.

III

There Has Been No Abandonment By The Second Circuit of the Test for Standing As Stated in Billy Baxter, Inc. v. Coca Cola Co., Under Section 4 of The Clayton Act And Thus No Conflict With Other Court Decisions

Petitoner next argues in its Point II that the Second Circuit has "abandoned the standing test announced in Billy Baxter,Inc. v. Coca Cola Co." 431 F. 2d 183 (2d Cir. 1970) cert. denied 401 U.S. 923. This is a phantom issue. Again the Second Circuit relied upon

the very decision to support its decision which the petitioner now claims it abandoned. This is again no more than an effort to reverse the District Court's findings of fact which were affirmed.

There is no support for petitioner's statement that Tri-City was formed for the "stated purpose of driving Hudson Valley's prices down." (Pet. 7) But there is support for finding by the District Court that "Hudson Valley simply withdrew from the competitive arena." (B-4) And the Second Circuit affirmed it, "Particularly in light of the departure of plaintiff's long-time manager and the rather precipitous termination soon thereafter, we are unable to say that this finding was erroneous." (A-3)

IV

There Is No Significant Issue That Should Be Settled By This Court Under Section 7 of the Clayton Act

If the creation of Tri-City were held to be an "indirect" acquisition by Tougher, Inc. and Tompkins, Inc., such a holding would, in the context of this case stand Section 7 of the Clayton Act on its head and result in a wholly unpredicted and unpredictable interpretation of that law.

The Second Circuit properly held that there was no "indirect" acquisition by these two corporate defendants and followed GAF Corp. v. Circle Floor Co., 329 F. Supp 823 (S.D.N.Y. 1971), aff'd 463 F. 2d 752 (2nd Cir. 1972) cert. dismissed pursuant to Rule 60, 413 U.S. 901.

With respect to the Clayton Act Section 7

allegations, the District Court stated that it was doubtful whether Section 7 applied to the "acts of the individuals Tougher and Tompkins in establishing Tri-City [to] make this an indirect acquisition by Tougher Co. and Tompkins Co. However, if Section 7 does apply, plaintiff has failed to establish a violation." (B-17) The Second Circuit went further and held that "under [the] circumstances section 7 does not apply." (A-9)

Clearly this case present no reason to disturb this finding or to warrant certiorari on this issue in view of the factors expressly considered by the Second Circuit. (A-8, A-9)

Petitioner also seeks to reverse the findings of the District Court that "plaintiff has failed to establish a violation." (B-17, B-18) It is patent that there has been no violation of Section 7 in the circumstances of this case.

Petitioner's reference to Section 1 of the Sherman Act (Pet. 12) is another belated attempt to insert for the first time in this litigation a new cause of action which was neither pleaded nor tried.

V

There Similarly Has Been No Other Departure From Precedent Under Section 1 of the Sherman Act

In Point IV petitioner claims that "[t]his is the only case known to petitioner in which a Federal Court has, in effect, exonerated a combination upon the grounds that it was only engaged in a price-fixing scheme, i.e. to drive down market prices." (Pet. 12)

This claim merely restates petitioner's conclusions about the substance and effect of the decisions of the lower courts. As discussed in Point II herein, this claim is illusory and no more than a final attempt to inject a new issue in the case that was decided to be wholly without merit.

CONCLUSION

In Graver Mfg. Co. v. Linde Co. 336 U.S. 271, 275 (1949) this Court held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." There has been no showing of any fact finding error made by the Courts below, much less of an obvious and exceptional showing of such error.

Despite petitioner's claims, it should be clear that the Second Circuit has neither overruled U.S. v. Socony Vacuum Oil Co., supra, under Section 1 of the Sherman Act, nor abandoned the standing test of Billy Baxter, Inc., supra., under Section 4 of the Clayton Act. The "indirect" acquisition issue under Section 7 of the Clayton Act fails in the context of this case to warrant review. There does not exist any other compelling reason for this Court to grant a writ of certiorari.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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